

No. 05-3451

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EUGENE WINKLER, *et al.*,

Plaintiffs-Appellees,

v.

DONALD H. RUMSFELD, as Secretary of Defense,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois

BRIEF OF AMICI CURIAE
COMMONWEALTH OF VIRGINIA, SENATOR JOHN WARNER,
CONGRESSMAN FRANK R. WOLF,
CONGRESSMAN BOB GOODLATTE, CONGRESSMAN TOM DAVIS,
CONGRESSMAN ERIC CANTOR & CONGRESSMAN VIRGIL GOODE
IN SUPPORT OF THE SECRETARY OF DEFENSE
AND IN SUPPORT OF REVERSING SUMMARY JUDGMENT AGAINST
THE SECRETARY OF DEFENSE

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DISCLOSURE STATEMENT

This disclosure statement contains the information required by F.R.A.P. 26.1 and Circuit Rule 26.1.

The law firm and other counsel representing these *amici* have not previously represented or appeared for any party or *amicus* in this case.

Troutman Sanders LLP is the only law firm that is expected to appear for the *amici* in this case (except to the extent that congressional *amici* may join an *amicus* brief in addition to this one).

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BRIEF OF *AMICI CURIAE*

The Commonwealth of Virginia, together with Senator John Warner, Congressman Frank R. Wolf, Congressman Bob Goodlatte, Congressman Tom Davis, Congressman Eric Cantor and Congressman Virgil Goode (collectively, “the Virginia *Amici*”), file this brief in support of the Defendant-Appellant, Donald H. Rumsfeld, Secretary of Defense, and in defense of the federal statute, 10 U.S.C. § 2554, by which the Secretary provides support to the Jamborees held by the Boy Scouts of America.¹

INTERESTS OF *AMICI*

The Virginia *Amici* are deeply mindful that the Establishment Clause is an important pillar of American constitutional jurisprudence and that it was a measure adopted by our own Commonwealth, the Virginia Statute for Religious Freedom, that served as the model for this valuable constitutional protection. *See, e.g., Everson v. Board of Education*, 330 U.S. 1, 13 (1947). At the same time, the Virginia *Amici* share a common concern about the decision of the District Court. By effectively prohibiting the National Scout Jamboree from being held at Fort A.P. Hill, the District Court decision is not only a blow to the Boy Scouts of

¹ This brief is filed pursuant to Rule 29(a), Federal Rules of Appellate procedure. Specifically, the Commonwealth of Virginia files this brief pursuant to the authority directly granted to States by Rule 29(a). The other Virginia *Amici* have obtained the consent of all parties to the filing of this brief.

America – an organization that the Virginia *Amici* hold in great respect – it is also a blow to the people of Virginia, who have welcomed the Jamboree to our Commonwealth for nearly a quarter century. It is a decision that cannot be justified by Establishment Clause jurisprudence and that needlessly damages both the economy and the public life of the Commonwealth. It is a decision that this Court should now reverse.

POSTURE OF CASE

This appeal arises out of a lawsuit brought by a group of federal taxpayers, located in Illinois, who challenged several federal statutes authorizing assistance to the Boy Scouts of America (“Boy Scouts” or “Scouting”) and/or Scouting programs. The challenge was based on the theory that, because the Boy Scouts exclude atheistists and agnostics from membership and adult leadership roles, such assistance violates the Establishment Clause. One challenged statute, 10 U.S.C. § 2554 (“the Jamboree statute”) authorizes the Secretary of Defense to provide assistance to “any national or world Boy Scout Jamboree.”

This assistance includes the loan of equipment and the furnishing of “services and expendable medical supplies as may be necessary or useful” 10 U.S.C. § 2554(a). Additionally, “[i]n the case of a Boy Scout Jamboree held on a military installation, the Secretary of Defense may provide personnel services and

logistical support at the military installation in addition to the support authorized under [other subsections of the Jamboree statute].” 10 U.S.C. § 2554(g).

On March 16, 2005, the District Court issued an opinion which, while rejecting some of Plaintiffs’ claims, declared that “the aid provided by the Jamboree statute violates the Establishment Clause.” *Winkler v. Chicago Sch. Reform Bd. of Trustees*, No. 99 C 2424, slip op. at 40 (N.D. Ill. Mar. 16, 2005). In a later decision, issued on June 22, 2005, the District Court granted a permanent injunction enjoining the Secretary of Defense from providing any aid to the Boy Scouts pursuant to the Jamboree statute.² *Winkler v. Chicago Sch. Reform Bd. of Trustees*, 382 F. Supp.2d 1040, 1043 (N.D. Ill. 2005).

ARGUMENT

In analyzing whether a government practice runs afoul of the Establishment Clause, courts typically apply the three-part test articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As explained by *Lemon*:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.

Id. at 612-13 (internal quotation marks and citations omitted).

The Virginia *Amici* firmly believe that *none* of these three prongs is violated by the Jamboree statute or by the Department of Defense’s support of the Jamboree

² The 2005 Jamboree was excluded from the sweep of the injunction.

at Fort A.P. Hill. Indeed, the Plaintiffs have not argued that such support for the Jamboree lacks a secular purpose so as to violate the first prong. *See Winkler*, slip op. at 37 (Mar. 16, 2005). Nor do the Plaintiffs argue that there is excessive entanglement so as to violate the third prong. *Id.*³ Instead, this case focuses on *Lemon*'s second prong, dealing with the effects of the challenged statute. Rather than duplicate arguments made elsewhere by the Secretary of Defense, the Boy Scouts of America, or other *amici*, the Virginia *Amici* will focus this brief on those aspects of that prong most familiar to them as the Commonwealth and as public officials in Virginia.

In order to survive scrutiny under the second prong, it is not necessary for the challenged practice to have absolutely no effect on the advancement of religion.⁴ Indeed, “[t]he Court has made it abundantly clear that not every law that confers an indirect, remote or incidental benefit upon [religion] is, for that reason

³ In *Agostini v. Felton*, 521 U.S. 203, 233 (1997), and subsequent school aid cases, the Supreme Court treated the issue of entanglement as an aspect of the inquiry into the statute’s effect. However, even after *Agostini*, the Court has sometimes described the *Lemon* test as a three-prong inquiry without reference to the *Agostini* modification. *E.g.*, *Van Orden v. Perry*, 125 S. Ct. 2854, 2861 n.6 (2005). Given the absence of any entanglement claim, any difference between the two formulations of the *Lemon* test is immaterial.

⁴ This is not to imply that the Jamboree has any significant religious effect. On the contrary, the Virginia *Amici* recognize that, while the Boy Scouts of America encourage their members each to pursue his own religious faith, it is by no means a religious or sectarian organization. *See* Charter and Bylaws of the Boy Scouts of America, Art. IX, § 1E (“Boy Scouts of America ... is absolutely non-sectarian”).

alone, constitutionally invalid.” *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) (internal quotation marks and citations omitted). In order to survive scrutiny under the second prong, it is only necessary that the advancement (or inhibition) of religion not be the *primary* effect.

Determining whether the primary effect of a challenged practice is the advancement of religion – or whether the *primary* effect is secular in nature – calls for a comprehensive understanding of the *various* effects the challenged practice is likely to have. One major secular effect of holding the Jamboree at Fort A.P. Hill is the tremendous boost that the event brings to the economy of Virginia, especially in Caroline County, and in the tourism sector of our state economy. Another such secular effect is the promotion of those civic virtues that the Jamboree embodies. These major secular effects will be the focus of this brief.

Origin of the Jamboree at Fort A.P. Hill

It is not by coincidence that the Jamboree has been held at Fort A.P. Hill for the past quarter century. Hosting the Jamboree is a major benefit for which Virginia competed vigorously – and successfully – against an array of other States.

The first Jamboree was held in 1937 in Washington, D.C., and beginning in 1950, it was held on a quadrennial bases in different locations across the country. In 1977, a Jamboree Study Committee was assembled to consider whether to select a permanent Jamboree site. While the Committee was deliberating, Fort A.P. Hill

provided the site for the Jamboree in 1981 and, again, in 1985. When the Committee reconvened following the 1985 Jamboree, Fort A.P. Hill was the top finalist, selected from among ten States submitting bids.

It was a decision based on an array of factors, including access to highways, private warehousing resources, transportation, the natural and developed features of the site – and the area’s historic interest. As one public official noted, the decision by the Boy Scouts to select Fort A.P. Hill as the permanent Jamboree site would bring “enormous benefits to the Commonwealth” and “enhance the economy of Virginia.” Letter of C. M. Williams, Stafford County Administrator, to Gov. Charles S. Robb, Aug. 2, 1985. Fort A.P. Hill – and Virginia – have been hosting the Jamboree ever since, and the positive economic forecast has been confirmed.

An Important Economic Engine

The Jamboree is an important economic engine for Virginia. As explained by one major newspaper twenty-four years ago: “Boy Scouts spend money. Their leaders spend money. And when thousands of them gather periodically for a National Scout Jamboree, they become Big Spenders.” Lois Reed Munday, *Scouts Honor Virginia with 10th Jamboree*, Washington Post, July 15, 1981, at E-1. Describing the Jamboree as an “economic windfall,” the newspaper went on to explain that the event would pump “at least \$6 million into the state’s economy,

directly and indirectly.” *Id.* The six million dollar figure is now obsolete. For the 2005 Jamboree, the Boy Scouts of America spent approximately \$17 million in Virginia, *not* including millions more spent by individual Scouts, Scout leaders and visitors to the Jamboree.⁵ Banning the Jamboree from Fort A.P. Hill would deprive Virginia of those important secular benefits.

Hardest hit would be Caroline County, the jurisdiction where Fort A.P. Hill is located. Predominantly rural with a population of 22,800,⁶ Caroline County reports that, during the months of July and August, 2005, sales of lodging and collection of lodging-related taxes increased by 24 percent over 2004, and that sales of meals and collection of meal-related taxes increased by 10 percent. These figures generated a total increase in sales and taxes for Caroline County of \$815,760, with the Jamboree being credited as “very likely the major growth factor” responsible for these increases. Caroline County Dep’t of Econ. Dev., *Caroline County/National Scout Jamboree After Event Review* (Oct. 2005).

⁵ As shown by the Boy Scouts’ projected 2005 Jamboree budget, these expenditures by the Boy Scouts of America include: “food supplies and equipment, \$4,500,000; physical arrangements, \$6,600,000; public safety, \$1,762,000; city services, \$2,228,000; subcamp operations, \$75,000; program supplies, \$1,025,000; administration, \$275,000; relationships, \$300,000.” These figures total \$16,765,000. Interoffice Memorandum from Don Wilson, Boy Scouts of America, to Doug Smith, Jr., Boy Scouts of America (December 6, 2002) (on file with author).

⁶ See Caroline County, Virginia, *Community Profile*, available at <http://www.co.caroline.va.us/about.html> (2003 figure).

The Economic Effects Are Far Reaching.

While the Boy Scouts of America spend a very sizeable sum on the Jamboree, it is only a fraction of the total economic benefit derived by Virginia. The Jamboree's role in attracting visitors to Virginia is enhanced by the proximity of Fort A.P. Hill to other major tourist destinations, especially those historical sites that figured so prominently in the colonial era, the American Revolution and the Civil War. Many of those destinations are less than a half day's drive from Fort A.P. Hill, thus permitting easy access by visitors to the Jamboree. Some of those nearby destinations – and the distances from Fort A.P. Hill – are as follows:

<u>Historic Destination</u> ⁷	<u>Miles from Fort A.P. Hill</u>
Appomattox Court House Scene of surrender by General Robert E. Lee	133
Ash Lawn-Highland Home of James Monroe	101
Berkeley Plantation Site of first official Thanksgiving in America Birthplace of William Henry Harrison	69
Chancellorsville Scene of major Civil War battle	29

⁷ Other nearby venues that lack a prominent historical component, but that attract large numbers of visitors, include the Blue Ridge Parkway, Busch Gardens Theme Park, Kings Dominion Theme Park, Luray Caverns, Potomac Mills Mall, Skyline Drive and Virginia Beach.

Cold Harbor Scene of major Civil War battle	45
College of William and Mary Founded in 1693 Second oldest institution of higher learning in U.S. Architecture by Christopher Wren	90
Colonial Williamsburg Restored colonial capital	90
Fredericksburg and Spotsylvania National Military Park Scene of major Civil War battles	23
Frontier Culture Museum Site of four reconstructed historic farms from Germany, England, Ireland and the U.S.	137
Henricus Park Site of colonial settlement	63
Jamestown First permanent English settlement in North America	90
Monticello Home of Thomas Jefferson	101
Montpelier Home of James Madison	67
Mount Vernon Home of George Washington	68
Natural Bridge One of the “7 Natural Wonders of the World”	178
Newmarket Scene of Civil War battle fought by Cadets from VMI	110

Saint John's Church	45
Site of Patrick Henry's "Liberty or Death" Speech	
Sherwood Forest	73
Home of John Tyler	
Virginia State Capitol	45
Concept designed by Thomas Jefferson	
University of Virginia	103
Founded and designed by Thomas Jefferson	
Washington and Lee University	167
Founded in 1749	
George Washington provided it with its first major endowment, and Robert E. Lee served as its president (1865-70)	
Virginia Military Institute (VMI)	167
Founded in 1839	
First state military college in U.S.	
Yorktown Victory Center	99
Site of surrender by British forces to the Continental Army	
Westover Plantation	70
Built in 1730	
Considered one of the most outstanding examples of Georgian architecture in the U.S.	

Many Scouts and other visitors to the Jamboree use their trip to Virginia as an opportunity to tour one or more of these historic venues. While no precise numbers are available, the Virginia *Amici* believe that such Jamboree-related visits are substantial. Moreover, figures compiled by the Virginia Tourism Corporation

show that the average traveler in Virginia spends \$65 per person per day.⁸ Given this figure – and given the hundreds of thousands of persons attending or visiting the Jamboree⁹ – the Jamboree-related visits to other tourist venues in Virginia provide an economic boost of several million dollars.

In addition to the positive economic effects for Virginia, there are civic and educational benefits nationwide when Americans from across the country have an opportunity to become acquainted with sites where so much of our national history occurred. Banning the Jamboree from Fort A.P. Hill would diminish the number of visitors to these sites, and thus diminish these important secular benefits.

The Jamboree's Benefits to Our Public Life

By striking down the Jamboree statute, the District Court has effectively banned the Jamboree from Fort A.P. Hill and deprived Virginia of its ability to host the event. Such a turn of events is not only harmful to our state economy, it is harmful to the public life of the Commonwealth. The Jamboree is a major civic event for the entire nation and, by their physical proximity, the people of Virginia are especially well-positioned to reap its rewards. The Jamboree provides our

⁸ Virginia Tourism Corporation, *2003 Virginia Visitor Study* (2004), available at <http://www.vatc.org/research/Pleasure-RelatedProfile.pdf>.

⁹ See Cathy Jett, *et al.*, *Jamboree Generating Big Windfall*, Free Lance-Star (Fredericksburg, Va.), July 25, 2005, available at <http://www.co.caroline.va.us/jamboreenews.html> (reporting that the Jamboree was “expected to draw 42,000 Scouts, volunteers and workers to the Fredericksburg area.” Further, “[a]n additional 2,200 military personnel will be on hand in support roles, and 270,000 visitors are expected. . .”).

people – and especially our youth – with a powerful example of civic virtues, including love of country, brotherhood, respect for nature and self-reliance. Open to the public, the Jamboree is visited by many thousands of Virginians, and with intensive local television and newspaper coverage, it is seen by many more. *See, e.g.,* www.TimesDispatch.com (reporting “Special Events” for 2005 Scout Jamboree). The high visibility of the Jamboree helps provide a valuable antidote to some of the more pernicious cultural influences with which young people are confronted today. This is a valuable *secular* effect, and eliminating the Jamboree from our midst would deprive us of its wholesome influence.

The District Court Decision Is Misguided.

Knowing that the Secretary of Defense has provided a comprehensive analysis of the applicable Establishment Clause jurisprudence, the Virginia *Amici* will not do so here. They would, however, comment on what is perhaps the most glaring error by the District Court. Specifically, the District Court erred by reducing the second prong of *Lemon* to the specific formulation used by the Supreme Court in the narrow context of aid to *religious schools*. As explained by the Court in *Mitchell v. Helms*, 530 U.S. 793 (2000), “the question whether governmental aid to *religious schools* results in government indoctrination is ultimately a question whether any indoctrination that occurs in those *schools* could reasonably be attributed to government action.” *Id.* at 809 (emphasis added). It

was the recognition that religious indoctrination *does occur* in religious schools that prompted the Court to turn the “neutrality principle” as a means of ascertaining whether that religious indoctrination can be fairly attributed to the government. As the Court explained, a school-aid program satisfies the neutrality principle when it is “offered to a *broad range* of groups without regard to their religion.” *Id.* (emphasis added). However, the Jamboree is decidedly *not* a religious school, and there is no basis to conclude that religious indoctrination occurs there. Thus, rather than search for “a broad range of groups” in a statute that names only the national and world Jamborees, the Court should be open to consider the likely effects of the Jamboree, including, *inter alia*, the decidedly secular effects described here. When the various likely effects are considered, it can hardly be said that the primary effect is to advance religion.¹⁰

For more than a half century, the Jamboree has occupied a unique place in the public life of our nation and, for nearly a quarter century, it has been our privilege in Virginia to host the event at Fort A.P. Hill. Only by a misreading of

¹⁰ In a related error, the District Court mistakenly regards the Jamboree statute as impermissibly defining its beneficiaries with “reference to religion,” *See Winkler*, slip op. at 38 (Mar. 16, 2005), even though the statute says nothing about religion, and even though the Jamboree is not a religious event. Even if the proper focus were the Boy Scouts in general, rather than the Jamboree in particular, the District Court would still be off the mark. While Scouting has a non-sectarian religious component, it is not primarily a religious organization. Thus, even a program of aid set aside for the general use of the Boy Scouts would not have the primary effect of advancing religion.

the Establishment Clause did the District Court reach its decision to strike down the Jamboree statute. That decision should now be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the District Court insofar as it grants relief to Plaintiffs should be reversed and summary judgment dismissing the complaint should be granted for the Defendant, Donald H. Rumsfeld, Secretary of Defense.

Dated November 8, 2005

Respectfully submitted,

The Virginia *Amici*

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2005, I filed the above Brief of *Amici Curiae*, by delivering, 25 copies of the Brief, along with a diskette containing a copy of the Brief, to Federal Express for overnight delivery to the Clerk's Office of the United States Court of Appeals for the Seventh Circuit. On the same day, I also served the Brief on the counsel listed below by delivering two copies of the Brief and one diskette to Federal Express for overnight delivery to each of the following:

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